April 25 1870

Submitted

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~41~~ 193

BENJAMIN F. IRVINE, PLAINTIFF IN ERROR,

vs.

JOHN R. IRVINE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

FILED JANUARY 6, 1869.

April 2 Affirmed

J. M. C. Marshall
Clerk

16

SUPREME COURT OF THE UNITED STATES.

No. 411.

BENJAMIN F. IRVINE, PLAINTIFF IN ERROR,

vs.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

INDEX.

	Original.	Print.
Writ of error	1	1
Return	3	1
Citation	4	1
Style of court	5	2
Declaration	5	2
Rule to plead	8	3
Plea and issue	9	4
Jury and trial	10	4
Verdict and judgment	11	5
Bill of exceptions	12	5
Clerk's certificate	36	15

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States of America holden in and for the district of Minnesota, greeting:

Because that in the process and record, and also in the rendering of judgment in a suit before you or some of you, between Benjamin F. Irvine, plaintiff, and John R. Irvine, defendant, in a plea which is in the said circuit court, a manifest error hath happened to the great damage of the said Benjamin F. Irvine, plaintiff, as he says, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States of America, together with this writ, so that you have the same at Washington on the first Monday in December next, in the said Supreme Court to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause
2 further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, at Saint Paul, in said district of Minnesota, this 19th day of December, in the year of our Lord one thousand eight hundred and sixty-eight, and of the indepence of the United States the ninety-third.

[SEAL.] H. E. MANN,
Clerk of the Circuit Court of the United States for the District of Minnesota.

LORENZO ALLIS, *Plaintiff's Attorney.*

(Indorsed:) Supreme Court of the United States. B. F. Irvine, pl'ff in error, vs. John R. Irvine, def't in error. Writ of error. Lorenzo Allis, att'y of pl'ff in error.

3 The answer of the judges of the circuit court of the United States for the district of Minnesota, in within writ mentioned:

The record and proceedings, whereof mention is within made, with all things concerning the same, are hereby respectfully certified to the justices of the Supreme Court of the United States within mentioned, in a certain schedule to this writ annexed, as within it is commanded.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, at St. Paul, in the district of Minnesota, this twenty-first day of December, A. D. 1868.

[SEAL.] H. E. MANN,
Clerk U. S. Circuit Court Dist. Minnesota.

4 UNITED STATES OF AMERICA, *ss:*

To John R. Irvine, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the first Monday in December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of

Minnesota, wherein Benjamin F. Irvine is plaintiff, and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Rensellaer R. Nelson, one of the judges of the circuit court of the United States for the district of Minnesota, this 19th day of December, A. D. one thousand eight hundred and sixty-eight.

[SEAL.] RENSSELAER R. NELSON,
One of the Judges of the Circuit Court of the United States for the District of Minnesota.

(Indorsed:) Supreme Court of the United States. B. F. Irvine, pl'ff in error, vs. J. R. Irvine, def't in error. Citation.

Due service of the within citation admitted Dec. 21s, 1868.
SMITH & GILMAN,
Att'ys for Def't in error.
Per PARKER.

Lorenzo Allis, att'y for pl'ff in error.

5 *Schedule.*

UNITED STATES OF AMERICA, *District of Minnesota, ss:*

Pleas before the hon. the judges of the circuit court of the United States of America in and for the district of Minnesota, at St. Paul, in said district, of the thirtieth day of April, in the year of our Lord one thousand eight hundred and sixty-four, and of our independence the eighty-eighth year.

BENJAMIN F. IRVINE
vs.
JOHN R. IRVINE.

DISTRICT OF MINNESOTA, *ss:*

Be it remembered that on this thirtieth day of April, in the year of our Lord one thousand eight hundred and sixty-four, came the marshal of the United States for the district of Minnesota, and filed in the clerk's office of said court the declaration of the plaintiff above named in this cause, which is in the words and figures following, viz:

Circuit court of the United States for the district of Minnesota.—Of the thirtieth day of April, in the year of our Lord one thousand eight hundred and sixty-four.

DISTRICT OF MINNESOTA, *ss:*

6 Benjamin F. Irvine, a plaintiff in this suit, who is a citizen of the State of Ohio, by Lorenzo Allis, his attorney, complains of John R. Irvine, defendant in this suit, who is a citizen of the State of Minnesota, in that whereas the said Benjamin F. Irvine, on the 15th day of October, in the year of our Lord one thousand eight hundred and forty-nine, was possessed of all those tracts or parcels of land, with the appurtenances, situate in the county of Ramsey, in the district aforesaid, and described as follows, to wit: Lots nine (9) and eleven (11) in block thirty-seven (37), lot eight (8) in block forty-one (41), lot three (3) in block forty-six (46), and lot eleven (11) in block forty-nine (49), all

in Rice and Irvine's addition to St. Paul, according to a certain plat thereof on record in the office of the register of deeds of the county of Ramsey aforesaid, four undivided fifths of which said premises the said Benjamin F. Irvine claims in fee, whereof the value is more than five thousand dollars; and he, the said Benjamin F. Irvine, being so possessed thereof, the said John R. Irvine afterwards, to wit, on the 31st day of December, in the year of our Lord one thousand eight hundred and forty-nine, entered into the said premises and ejected the said Benjamin F. Irvine therefrom, and unjustly withholds from the said Benjamin F. Irvine the possession thereof, to the damage of the said Benjamin F. Irvine five thousand dollars. And therefore he brings his suit, &c.

LORENZO ALLIS,
Attorney for Plaintiff.

7 To which declaration was attached the following notice or memorandum in writing, viz:

To John R. Irvine, the defendant aforesaid:

You are hereby notified that the declaration, with a copy whereof you are now herewith served, and to which copy this notice is subjoined, will be filed on the thirtieth day of April instant; and that, upon filing the same, a rule will be entered requiring you to appear and plead to the said declaration within twenty days after the entry of such rule; and that, if you neglect to so appear and plead, a judgment by default will be entered against you, and the plaintiff will recover possession of the premises specified in the said declaration.

Dated the 29th day of April, A. D. 1864.

Yours, &c.,

LORENZO ALLIS,
Plaintiff's Attorney.

Which said declaration and notice were indorsed by the marshal of the United States for the district of Minnesota in the words and figures following, viz:

DISTRICT OF MINNESOTA, *ss:*

I hereby certify that on the 29th day of April, 1864, at the city of St. Paul, in the State of Minnesota, I personally served J. R. Irvine, the defendant in this suit, who is the actual occupant of the premises for which this action is brought, with a true copy of the declaration
8 hereto annexed, and also a true copy of the notice in writing to the said declaration subjoined and likewise hereunto annexed.

Service and travel, $2 12.

CHAS. EATON,
U. S. Marshal.

And afterwards, to wit, on the 30th day of April, in the year of our Lord one thousand eight hundred and sixty-four, came the said plaintiff by Lorenzo Allis, his attorney, and entered in the rule and order book of said court the rule to plead in the words and figures following, to wit:

BENJAMIN F. IRVINE
vs.
JOHN R. IRVINE. } Of the 30th day of April, A. D. 1864.

In this cause the declaration and notice having been returned per

sonally served, and the defendant having entered no appearance, on motion of Lorenzo Allis, plaintiff's attorney, ordered that the defendant herein plead to the plaintiff's declaration on file within twenty days after the entry of this rule, or be defaulted.

And afterwards, to wit, on the ninth day of May, in the year of our Lord one thousand eight hundred and sixty-four, came the defendant by Smith & Gilman, his attorneys, and entered his appearance in said cause, and filed in the clerk's office his plea to the plaintiff's declaration in the words and figures following, viz:

United States circuit court for the district of Minnesota.

9 BENJAMIN F. IRVINE
vs.
JOHN R. IRVINE. } Plea.

Of the thirtieth day of April, in the year of our Lord one thousand eight hundred and sixty-four.

And the said John R. Irvine, by his attorneys, Smith & Gilman, comes and says he is not guilty of unlawfully withholding the premises claimed by the said Benjamin F. Irvine, as alleged in said declaration of the said Benjamin F. Irvine; and of this he puts himself upon the country, and the said plaintiff doth the like.

SMITH & GILMAN,
Att'ys for said Def't.

And afterwards, to wit, at a stated term of said court, to wit, the June term thereof, in the year of our Lord one thousand eight hundred and sixty-four, on the seventh day of said term, the following proceeding, among others, was had, viz:

BENJAMIN F. IRVINE
vs.
JOHN R. IRVINE. } Ejectment.

And now comes the plaintiff in this cause by Lorenzo Allis, his attorney, and the defendant appears by John M. Gilman, his attorney; and it appearing that this cause is properly on the calendar, on motion of plaintiff by his attorney, ordered that this cause do stand for immediate trial.

10 And thereupon the following jurors were duly empannelled and sworn to try the issue joined herein, viz: Abner Allen, J. C. Stevens, Joseph Carli, W. Carpenter, Samuel Moss, A. Armstrong, J. W. Tyson, Thos. McMannus, J. M. Williams, Geo. F. Potter, H. J. Taylor, Geo. Watson.

Case opened for plaintiff by L. Allis, his attorney, and documentary evidence introduced.

And here the plaintiff rests his case.

Case opened for defendant, and documentary evidence introduced on his part.

And here the defendant rests his case.

Benj. F. Irvine and Mrs. Findley McCormick sworn and examined as witnesses on the part of the plaintiff.

John R. Irvine sworn and examined as a witness on the part of the defendant.

And afterwards, to wit, on the eighth day of said term of said court, the following proceeding, among others, was had, viz:

BENJAMIN F. IRVINE
vs.
JOHN R. IRVINE. } Ejectment.

Jury called, and all answered to their names.
Examination of John R. Irvine resumed.
Nancy Irvine sworn and examined as a witness on the part of the defendant; Mrs. Trumbull sworn and examined as a witness on the part of the defendant; Hiram Stillwell and J. R. Humphrey sworn and examined as witnesses on the part of the defendant.

11 And here the defendant rests his case.
J. M. Gilman, esq., sums up for defendant.
Lorenzo Allis, esq., sums up for plaintiff.

And afterwards, to wit, on the 9th day of said term of said court the following proceeding, among others, was had:

BENJAMIN I. IRVINE
vs.
JOHN R. IRVINE. } Ejectment.

And now the jurors empannelled to try the issue joined in this cause are called and all answer to their names, and thereupon charge is given by the court to the jury, who then retire in charge of an officer duly sworn and qualified to attend them, and who being returned into court say that the said John R. Irvine is not guilty of the trespass or ejectment laid to his charge in manner and form as the said Benjamin F. Irvine hath complained against him. Therefore it is considered that the said defendant go without day and recover of the plaintiff his costs herein to be taxed, and that he have execution therefor.

And afterwards, to wit, at said term of said court, the said plaintiff, by his said attorney, presented his bill of exceptions, which was duly signed and sealed by the judge presiding in said court and filed therein, and is in the words and figures following:

12 Circuit court of the United States for the district of Minnesota.

BENJAMIN F. IRVINE, plaintiff,
vs.
JOHN R. IRVINE, defendant. } Ejectment.

Be it known that afterwards, to wit, at the June term, A. D. 1864, of said court, held at the city of Saint Paul, in said district, and on the day of June, A. D. 1864, before the Honorable R. R. Nelson, associate justice of the said court, the aforesaid issue came on to be tried by a jury of said district for that purpose duly impannelled, good and lawful men of said district. At which day came then the said plaintiff and the said defendant, by their respective attorneys aforesaid, and the jurors of the jury aforesaid empannelled to try said issue being called also came, and were then and there in due form chosen and sworn to try said issue. And upon the trial of the said issue, the counsel for the said pl'ff, to maintain and prove the said issue upon his part, produced and offered in evidence certain letters patent of land from the United States to the said plaintiff, in words and figures following, to wit:

Pre-emption Certificate No. 141.

The United States of America to all to whom these presents shall come, greeting:

Whereas Benjamin F. Irvine, of St. Croix County, of Wisconsin,
13 has deposited in the General Land Office of the United States a certificate of the register of the land office at the falls of St. Croix, whereby it appears that full payment has been made by the said Benjamin F. Irvine according to the provisions of the act of Congress of the 24th of April, 1820, entitled "An act making further provision for the sale of public lands," for lot No. four of section six, in township twenty-eight north, of range twenty-two west, in the district of lands subject to sale at the falls of St. Croix, Wisconsin, containing fifty-one acres and sixty-four hundredths of an acre, according to the official plat of the survey of said lands returned to the General Land Office by the surveyor general, which said tract has been purchased by the said Benjamin F. Irvine. Now know ye, that the United States of America, in consideration of the premises, and in conformity with the several acts of Congress in such case made and provided, have given and granted, and by these presents do give and grant, unto the said Benjamin F. Irvine, and to his heirs, the said tract above described, to have and to hold the same, together with the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging, unto the said Benjamin F. Irvine, and to his heirs and assigns, forever.

In testimony whereof, I, Zachary Taylor, President of the
[SEAL.] United States of America, have caused these litters to be made patent, and the seal of the General Land Office to be hereunto
14 affixed. Given under my hand at the city of Washington, the eighth day of October, in the year of our Lord one thousand eight hundred and forty-nine, and of the independence of the United States the seventy-fourth.

Z. TAYLOR.

By the President:

By THOS. EWING, JR.,
Secretary.

THOS. S. WILSON,
Acting Recorder of the General Land Office ad interem.

Recorded vol. 1, page 130.

And the counsel for the plaintiff, further to maintain and prove said issue, offered to prove that the lands described in the declaration were parcels of the lands described in and granted by said letters patent, and also that said defendant was then, and at the commencement of this action, in possession of the lands described in said declaration; and the counsel for def't thereupon offered to admit, and, on behalf of said defendant, it was then and there duly admitted by the said counsel, in behalf of said defendant, that the lands described in said declaration were parcels of the land described in and granted by said letters patent, and that the said def't was then, and at the commencement of this action, in possession thereof.

And the counsel for pl'ff here rested his case.

And the counsel for the def't, to maintain and prove said issue upon his part, produced and offered in evidence a certain deed, purporting to be a deed of conveyance of the lands therein described from
15 said plaintiff to said defendant, in words and figures following, to wit:

This indenture, made this 8th day of May, 1849, between Benjamin F. Irvine, of the county of St. Croix, and Territory of Minnesota, of the first part, and John R. Irvine, of the same place, witnesseth: That the said party of the first part, for and in consideration of the sum of five hundred dollars in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has given, granted, bargained, sold, conveyed, and confirmed, and by these presents does give, grant, bargain, sell, convey, and confirm unto the said party of the second part, his heirs and assigns, forever, all the following-described piece or parcel of land, with the exception and reservation hereinafter mentioned, situate, lying, and being in the county of St. Croix, and known and designated as follows: as lot number four (4) in section number six (6), in township number twenty-eight (28) north, of range number twenty-two (22) west, containing fifty-one acres and sixty-four hundredths. Said lot or tract of land has been surveyed and laid out in town lots by B. W. Bronson, and is a part of Rice & Irvine's addition to St. Paul; and the said Benjamin F. Irvine reserves to himself lots number eight (8) and seven (7) in block number thirty-five (35), and lot number twelve (12) in block thirty-seven (37), fronting on Washington street; lot number nine (9) in block number forty-six (46), and lot number twelve (12)
16 in block number forty-seven (47), fronting on Washington street; lot number six (6) in block number thirty-one (31), fronting on Exchange street—each of said lots thirty feet in length and one hundred and fifty deep; and lot No. ten (10) in block number thirty-one (31), fronting public square, fifty feet long and one hundred and twenty (120) feet deep. To have and to hold the same, together with all and singular the appurtenances and privileges thereunto belonging, or in anywise appertaining, and all the estate, right, title, interest, and claim whatsoever of the said party of the first part, either in law or equity, in and to the above-described premises to the only proper use, benefit, and behoof of the said party of the second part, his heirs and assigns, forever. And the said party of the first part, for himself, his heirs, executors, and administrators, doth covenant and agree to and with the said party of the second part, his heirs, and assigns, that he is well seized in fee of the aforesaid premises, and has good right to sell and convey the same in manner and form as above written, and that the same are free from all incumbrances whatsoever; and that the aforesaid premises in the quiet and peaceable possession of the said party of the second part, his heirs, and assigns, against all and every person lawfully claiming or to claim the whole or any part thereof, he will forever warrant and defend.

In testimony whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

BENJAMIN F. IRVINE. [SEAL.]

17 Sealed and delivered in the presence of—
WM. D. PHILLIPS.
C. COOK.

TERRITORY OF MINNESOTA, *County of St. Croix, ss:*

Be it known that on the 8th day of May, A. D. 1849, before the undersigned personally came Benjamin F. Irvine, the grantor of the foregoing and within deed from him as such grantor to John R. Irvine, to me personally known to be the identical person described in and who executed said deed, and he has acknowledged that he executed said deed freely and voluntarily for the uses and purposes therein expressed.

BENJ. W. BRUNSON,
Justice of the Peace, Register of Deeds Office, County of St. Croix.

I hereby certify that the above deed and acknowledgement was this day produced in this office, and was thereupon duly recorded in Book B, pages 176 and 177.

Done at Stillwater, May 22d, A. D. 1849.

W. HOLCOMBE, *Register of Deeds.*

Filed Nov. 16, A. D. 1855, at 4¾ p. m.

And the counsel for the plaintiff then and there objected to the introduction of said deed in evidence, on the ground that the same, having been executed before said letters patent were given, did not convey from said plaintiff to said defendant the estate which said plaintiff acquired under and by virtue of said letters patent, and that said evidence was incompetent and irrelevant to said issue. But the said judge of
18 said court did then and there overrule said objection, and decide that the said deed should be read in evidence on the part of the said defendant, to which opinion and decision of the said judge the said counsel for the said plaintiff did then and there on behalf of the said plaintiff except.

And the counsel for the defendant, further to maintain and prove the issue on his part, proceeded to offer in evidence a certifiate of the register of the land office, in words and figures following, to wit:

U. S. LAND OFFICE,
Taylor's Falls, Minnesota, June 14th, 1864.

I hereby certify that on examination of the tract-books, plats, and other official records of this office, I find that on the 21st day of February, 1849, one Benjamin F. Irvine entered lot (4) four in section No. six (6), in township No. twenty-eight (28), of range No. twenty-two (22); that the patent for said land was issued under date of October 8th, 1849, by the President of the United States to the said Benjamin F. Irvine; and it further appears by the records of this office that no other person or persons ever acquired any title from the United States to said land.

In witness whereof, I have hereunto set my hand at the land office, Taylor's Falls, Minnesota, the day and year first above written.

G. M. STICKNEY, *Register.*

And the counsel for the plaintiff then and there objected to the introduction of said certificate in evidence on the ground that the
19 same was incompetent and irrelevant. But the said judge of said court did then and there overrule said objection, and decide that the said certificate under the laws of the State of Minnesota should be read in evidence on the part of said defendant; to which opinion and decision of said judge the said counsel for said plaintiff did then and there on behalf of said plaintiff except.

And the counsel for the defendant here rested his case.

And the counsel for the plaintiff, further to maintain and prove the said issue on his part, called Benjamin F. Irvine as a witness, who, being duly sworn, testified:

I am pl'ff in this action; know the def't; he is my elder brother; about 16 years older than I am; know the property in controversy. (Said witness was then shown the deed put in evidence by the counsel for the defendant purporting to have been executed by said pl'ff to said def't on the 8th day of May, A. D. 1849, and hearing the same, further testified:) I recognize this deed as one executed by me at the time it

purports to have been executed—the 8th day of May, 1849. When I executed this deed I was not twenty-one years old. I was born on the 23d day of May, A. D. 1828. I came of age on the 23d day of May, A. D. 1849. I executed this deed on the day it was dated. A few days before I executed this deed my brother, the defendant, came to me, and wanted me to make him a deed of this piece of land. I told him that that was something I did not expect of him. He told me that
20 he had agreed to sell certain lots to other parties, and that he wanted a deed from me. I told him I did not expect this from him, though I would consider the matter. I told him I would convey the lots he had bargained. He pressed me to convey to him the whole. I refused at that time to give him the deed. Afterwards he came to me again, and asked me if I had made up my mind to deed him the land. I told him I had with certain reservations. I selected certain lots, and went to Mrr. Philips, and had him draw a deed of this land, reserving to myself twelve lots. He drew the deed. I acknowledged it. I handed it to the defendant. He was very indignant, and would not accept it. He said he had conveyed some of the lots I had reserved. He then threatened me that if I would not convey him the property he would take measures that would deprive me of it anyhow. He used such language to me that I was finally induced to say to him that he might make a deed as he chose, and I would sign it. After he saw what my feelings were, he selected out seven lots which he said I might reserve. I then went and had a deed made of this property, reserving the lots he had selected, and executed it. This deed in evidence, and now shown me from myself to def't, dated the 8th May, A. D. 1849, is the one I then executed.

And the counsel for said def't, further to maintain and prove
21 said issue on his part, then cross-examined said witness, and on such cross-examination he testified:

I entered this land in February, A. D. 1849. The register of the land office was here in St. Paul, and I paid him the money for the land. I took his personal receipt and agreement to send me the duplicate. He afterwards sent me the duplicate for the land. The defendant furnished me the money to pay for the land. I did not enter the land for him. He did not furnish me with the silver to enter the land for him. I did not tell the land officers that I wanted to enter the land for him. The defendant did not pay me anything for the land when I deeded to him. I never joined in the survey and plotting of this land into town lots. When I took the money to enter this land, it was not understood between myself and defendant that I should enter it for him. I moved to Ohio in 1861, where I now reside. I resided in St. Paul from the time I made this deed till 1861, with the exception of fifteen months.

And the counsel for the plaintiff, further to maintain and prove said issue on his part, then re-examined said witness, and on such re-examination he testified:

The def't came to me and told me that there was quite a strife to get land, and advised me to enter this land. At the time I paid for
22 it he told me that the register was present in Saint Paul, and that I had better take the money and give it to the register, and save myself a trip to Saint Croix Falls, where the land office was then kept. There was no understanding that I was entering the land for the defendant, or that I should afterwards deed it to him. I entered the land as pre-empted. This is the personal receipt which I took when I paid the money for the land.

And the counsel for the plaintiff, further to maintain and prove said issue on his part, then introduced and read in evidence the aforesaid personal receipt, identified and referred to by the aforesaid witness, which was in words and figures following, to wit:

"This is to certify, that I, G. W. Brownell, clerk for the register of the Falls of St. Croix land office, have this the 21st day of February, A. D. 1849, received of Benjamin F. Irvine, of St. Croix County, Territory of Wisconsin, the sum of sixty three $\frac{55}{100}$ dollars ($63 55), being in full payment for the purchase of lot number four, in section No. six, in township No. 28 north, of range No. 22 west of 4th principal meridian, containing fifty-one and sixty-four hundreths acres.

"This receipt, it is understood, shall be replaced by a duplicate receipt under the proper signature, as prescribed by law.

"G. W. BROWNELL,
"*Clerk for Register.*

"ST. PAUL, *Wisconsin Territory.*"

23 And the counsel for the plaintiff, further to maintain and prove said issue on his part, called Mrs. McCormick as a witness, who, being duly sworn, testified:

I am acquainted with the parties to this action, and a sister of the parties. I am older than the plaintiff but younger than the defendant. I know the plaintiff's age and the time of his birth. He was born the 23d day of May, A. D. 1828. There was a record of the births in our family kept in the family Bible. I have seen that record; it was formerly in the possession of my father and mother in Danville, State of New York. I took a copy of that record while in their possession, which I still have. My father and mother are dead. I afterwards saw that Bible, and the record in it, at the house of the defendant, in St. Paul. This was in 1856, I think. The birth of the plaintiff was in this record.

And the counsel for the plaintiff, further to maintain and prove said issue on his part, offered to call Mrs. Bradley as a witness, who would testify that she was an elder sister of the plaintiff, and knew his age and the time of his birth, and knew that he was born on the 23d day of May, A. D. 1828. And thereupon the counsel for the defendant stated to the court that he should not offer any evidence on the part of the defendant as to the age of the plaintiff, and that there would be no controversy raised by the defendant on that question. And thereupon
24 the counsel for the plaintiff here rested his cause.

And the counsel for the defendant, further to maintain and prove said issue on his part, then called John R. Irvine, the defendant, as witness, and offered to prove by said witness that he, said defendant, came to St. Paul in 1843, and that plaintiff came there in 1848, and boarded with defendant, and lodged with him a portion of the time, and that defendant furnished the plaintiff the money to enter the land, and that plaintiff was to enter it in defendant's name; and that plaintiff took the money and went to the land office in Stillwater, to enter the land, and was gone four days, and when he came back he informed witness that he had entered the land in his own name, and would deed it to witness—he having been advised at the land office to enter it in his own name; and that this took place in February, 1849; and that since the deed from plaintiff to witness was executed, and before the commencement of this action, large and valuable improvements, to the amount of $40,000, have been erected on portions of the land described in said deed, but no part of them on the premises described in the declaration

in this case. But to the admission of said matters, so offered to be given in evidence on the part of the said defendant as aforesaid, the counsel for the said plaintiff did then and there object, because that the same was incompetent and irrelevant. But the said judge did then and there overrule said objection and decide that the matters so offered as
25 aforesaid should be given in evidence on the part of the said defendant; to which said opinion and decision of the said judge the said counsel for the said plaintiff did then and there, on behalf of said plaintiff, except.

And the said counsel for said defendant, further to maintain and prove said issue on his part, produced and offered in evidence a certain written agreement of lease between the said defendant, of one part, and the said plaintiff, defendant, and others, of the other part, in words and figures following, to wit:

Articles of agreement made and entered into this 8th day of May, 1854, between John R. Irvine, of the first part, and John R. Irvine, George Irvine, George W. Turnbull, and Benj. F. Irvine, acting and doing business under the name and firm of J. R. Irvine & Co., of the second part, all of the city of St. Croix, county of Ramsey, and Territory of Minnesota, as follows, viz: The said J. R. Irvine, party of the first part, for and in consideration of the sum hereinafter mentioned, doth agree to lease and rent for the term of one year from the first day of May, A. D. 1854, to the first day of May, 1855, his new frame warehouse, situated at the upper landing in the city of St. Paul, to the aforesaid J. R. Irvine, George Irvine, George W. Turnbull, and Benj. F. Irvine, for the term aforesaid, they to have the exclusive right to occupy said building, storeroom, offices, and the levee in front of said building, and all other rights and privileges which may be requisite or neces-
26 sary to the successful prosecution of the business of the wholesale and retail of groceries and provisions; also in the storage, forwarding, and commission business. In consideration of which the said parties of the second part hereby promise and agree to pay to the said party of the first part the yearly rent of one thousand dollars, payable as follows, viz: Two hundred and fifty dollars on the 1st day of August, A. D. 1854; two hundred and fifty dollars on the 1st day of November, A. D. 1854; two hundred and fifty dollars on the 1st day of February, A. D. 1855; and two hundred and fifty dollars on the 1st day of May, A. D. 1855; and for the true and faithful payment of the aforesaid sum of one thousand dollars as above stated, we, the parties of the second part, hereby bind ourselves, collectively and individually, our heirs and executors, administrators and assigns, and at the expiration of the said term of one year, to yield up quiet and peaceable possession of said premises to the said party of the first part, in as good order and repair as the same now are, reasonable wear, tear, and accidents by fire only excepted. The said John R. Irvine, party of the first part, hereby reserving so much of the office aforesaid as may be required for a desk, books, papers, and for the transaction of his private business without any interruption or molestation by the said parties of the second part, or either of them.

27 In testimony whereof, the said parties have hereto set their hands and seals the day and year first above written.

JOHN R. IRVINE. [SEAL.]
GEO. IRVINE. [SEAL.]
GEO. W. TURNBULL. [SEAL.]
B. F. IRVINE. [SEAL.]
JOHN R. IRVINE. [SEAL.]

Signed, sealed, and delivered in presence of—
J. C. BURBANK.
J. MCCORMICK.

And the said John R. Irvine, above mentioned, hereby agrees to give the above-named firm the privilege of extending the lease above named as may be agreed upon by them, the rent to be proportioned according as the business may justify, either by increasing or decreasing the same.

St. Paul, May 20th, 1854.

JOHN R. IRVINE.

And it was then and there conceded by the parties that the premises described in said lease were no part of the premises described in said plaintiff's declaration, but that the warehouse mentioned therein was situated on a portion of the premises described in said patent and in the deed from plaintiff to said defendant. And to the reading of said written agreement of lease in evidence, the said counsel for the said plaintiff did then and there object, because that the same was incompetent
28 and irrelevant. But the said judge did then and there overrule said objections, and decide that the said written agreement of lease should be read in evidence on the part of said defendant; to which said opinion and decision of said judge the said counsel of said plaintiff did then and there, on behalf of said plaintiff, except.

And the said counsel for the said defendant, further to maintain and prove said issue on his part, called as a witness Mr. Humphrey, and offered to prove by said witness that he, the said witness, some time in 1853 or '4, took to the plaintiff the draft of a quit-claim deed from said plaintiff to one Tallis, of two lots, being parcels of the land described in said patent, and in the deed from plaintiff to said defendant, but no part of the premises described in said plaintiff's declaration, and asked said plaintiff to execute the same, and that plaintiff refused to execute the same, saying he claimed no interest in these lots, and it was unnecessary for him to execute the quit-claim. But to the admission of said matters so offered to be given in evidence on the part of the said defendant as aforesaid, the said counsel for the said plaintiff did then and there object, because the same were incompetent and irrelevant. But the said judge did then and there overrule said objection, and decide that the matters so offered should be given in evidence on the
29 part of said defendant; to which said opinion and decision of said judge the said counsel for the said plaintiff did then and there, on behalf of said plaintiff, except.

And the counsel for the def't here rested his cause.

And the counsel for the said pl'ff, further to maintain and prove said issue on his part, gave in evidence by competent witnesses that some time in 1853 or '54 def't applied to pl'ff to get pl'ff to execute to def't a deed of the premises described in the said deed dated the 8th May, 1849, and that said pl'ff then refused to execute said deed, saying that if he had any right to said property he intended to hold on to them; and also, that said pl'ff in 1858 gave notice, by advertisement published in the newspapers at St. Paul, that he claimed to be the owner of the premises described in the said patent, and that said deed dated 8th of May, 1849, from said pl'ff to said def't was void.

And the said plaintiff's counsel here rested his case.

And thereupon the counsel for the plaintiff requested the court to

give to the jury the following instructions as hereinafter numbered, to wit:

1st. That the deed in evidence from pl'ff to def't, dated 8th May, 1849, did not pass the estate acquired subsequently under the patent
30 in evidence from the government to the plaintiff, even assuming the majority of the plaintiff at the time of its execution. But the court declined so to instruct the jury.

2d. If the jury find that the said deed was executed by the pl'ff while under age, (and the evidence is uncontroverted on this point,) the said deed is void. But the court declined so to instruct the jury.

4th. A deed of land executed by an infant may be avoided by the infant after he becomes of age, at any time within the period of the statute of limitations, which in this State is twenty years; that is, he may in such case in this State avoid his deed at any time within twenty years after he becomes of age. And the court instructed the jury that such was the law, unless the infant had previously ratified the deed.

5th. Such avoidance may be by another deed of same land to another grantee after the infant becomes of age, or it may be by suit, or by other similar unequivocal act. And the court so instructed the jury.

6th. In case of sale or deed of real estate by an infant, there must be some act of affirmance by him after he becomes of age, as solemn in character as the original act itself; otherwise the deed may be
31 avoided by him at any time before the statute of limitations bars him. Mere acquiesence, however long, if short of the statute of limitations, is not sufficient. The act of confirmation must be of such solemn and undoubted nature as to establish a clear intention to confirm the deed after a full knowledge that it was avoidable. And the court declined to instruct the jury that the act of affirmance must be as solemn in character as the original deed itself; but stated that mere acquiescence is not of itself sufficient evidence of affirmance, and that the ratification or affirmance must be of a clear and unequivocal character, showing the intention of the infant to confirm his deed.

7th. There is no evidence whatever of any affirmance or confirmation of the deed in this case by the pl'ff after he became of age, of the nature and character required. The evidence in this case shows no affirmance of this deed by the pl'ff after he became of age. But the court declined so to instruct the jury.

8th. No agency or trust binding on the pl'ff has been shown to have been created or to have existed between the pl'ff and def't during the infancy of the former. No contract is binding on the infant made during his infancy except for necessaries. And the court instructed the jury that the latter portion of this request was true, and that although an agency or trust could not be created binding upon the infant,
32 still if there was subsequent ratification by the infant of acts done during his infancy he would be bound by them.

9th. Even had the pl'ff been of full age when the def't gave him the money to enter the land, as def't testifies, and directed him, as def't testifies, to enter the land for def't, and the said pl'ff had entered the land in his own name, still the def't could not have compelled in law or equity the pl'ff to deed or convey to the property to said def't. And the court declined to so instruct the jury upon the ground that it was admitted by the def't that said pl'ff was not of full age when the money to enter land was given him, and consequently this request had no application to the case in hand.

10th. No trust has been shown in this case between the parties to this suit by which the def't could have enforced a conveyance of the land

from said pl'ff to him. And the court declined to instruct the jury as above requested, but said that there had been evidence on the part of def't going to show that the pl'ff was employed to enter the land in question, and although an infant, as he afterwards affirmed, his acts would be bound by it.

11th. Even if the pl'ff had entered the land as agent of def't, and had entered it in his own name contrary to instructions of his principal, yet if the def't afterwards approved of such entry, such approval
33 was a ratification of said entry. And the court instructed the jury that this might be true, but the evidence showed that the infant had conveyed the land after entry by him, ant it was for the jury to say whether he had ratified his deed.

12th. No acts of affirmance by the pl'ff have any bearing in this case, except they relate to the property described in the declaration, and all evidence on this point, except as to the lots described in the declaration, must be excluded and disregarded by the jury. And the court declined so to instruct the jury.

To all and singular which refusals and instructions aforesaid, the said counsel for plaintiff did then and there, on behalf of said plaintiff, respectively except.

And the said judge of said court did then and there further instruct said jury as to the 4, 5, and 6 of said instructions so prayed by said pl'ff's counsel as aforesaid.

That the question here is not whether there has been an avoidance. The defence is that the deed has been ratified by plaintiff. I am of the opinion that said ratification should be, if not equally solemn, of a clear and unequivocal character, showing the intention of the party to confirm the deed. An avoidance may be by a deed to a third party, or, as held in this country, in other ways. But the deed from pl'ff to def't was not
34 void; it was simply voidable and passed the title absolutely, until by some adequate act he affirmed it. The question is, has it been disaffirmed or ratified by pl'ff since he come of age? All the facts in proof, such as leasing part of the property, remaining in the vicinity a long time without asserting his claim while valuable improvements were being put on the property, are to be considered by the jury in deciding whether there has been a ratification by pl'ff; but mere acquiescence does not amount to a ratification. The authorities are somewhat conflicting as to what is necessary to constitute an avoidance. Lord Lyndhurst was of opinion that a deed was necessary to avoid a deed given while under age. I think that this doctrine is perhaps sound, and ought to have been held in this country; but it has been held in this country that an infant may avoid his deed by going upon the land, or by bringing suit, &c.

And with the foregoing qualification the 6th instruction asked by the pl'ff's counsel is correct, with the exception that the counsel has reversed the application of the law in his proposition. The act of avoidance and not the ratification is what the law requires to be equally solemn with the conveyance.

To which said instructions of the said judge, in so far as they differed from, or changed or qualified the said instructions so prayed by
35 said pl'ffs' counsel as aforesaid, the said counsel for said pl'ff did then and there on behalf of said pl'ff except.

And the said judge of said court did then and there further instruct said jury that there had been evidence on the part of def't going to show that the pl'ff was employed as an agent to enter the land in question, and although an infant, if he afterwards affirmed his agency, he would be bound by the terms of such agency. To which said instruc-

tion the pl'ff's counsel did then and there on behalf of said pl'ff except.

And thereupon the said judge left the aforesaid issue and the evidence so given on the trial thereof as aforesaid to the said jury, who then and there gave their verdict for the said defendant.

And because the aforesaid several matters did not appear by the record of the said trial and verdict, the said pl'ff's counsel did then and there propose his aforesaid exceptions to the opinion of said judge, and request him to put his seal to this bill of exceptions.

Whereupon the said judge hath to this bill of exceptions put his seal this 6th day of July, A. D. 1864.

[SEAL.] R. R. NELSON,
U. S. Judge.

Judgment record signed this eleventh day of July, A. D, 1864.
H. E. MANN, *Clerk*

36 UNITED STATES OF AMERICA,
CIRCUIT OF THE UNITED STATES,
For the District of Minnesota, ss:

I, H. E. Mann, clerk of said court, do hereby certify and return to the honorable the Supreme Court of the United States that the foregoing is a true and complete transcript of the record, process, pleadings, orders, final judgment, and all other proceedings in said cause, and of the bill of exceptions therein, as appears from the original records and files of said court. And I do further certify and return that I have annexed to said transcript, and do hereby transmit therewith, the original citation of appeal together with the proof of the service thereof.

In witness whereof, I have hereunto set my hand and affixed the seal of the said court, at Saint Paul, in the district aforesaid, this twenty-first day of December, in the year of our Lord one thousand eight hundred and sixty-eight, and of the independence of the United States the ninety-third year.

[SEAL.] H. E. MANN, *Clerk.*

Fees:

Writ error	1 00
Return, 80 folios	12 00
Two seals	40
	$13 40

Supreme Court

OF THE

UNITED STATES.

BENJAMIN F. IRVINE, *Plaintiff in Error,*

vs.

JOHN R. IRVINE, *Defendant in Error.*

Supreme Court of the United States.

BENJAMIN F. IRVINE, Plaintiff in Error,

vs.

JOHN R. IRVINE, Defendant in Error.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

The plaintiff brings ejectment to recover from the defendant possession of certain lots in Rice & Irvine's addition to St. Paul.

See declaration Printed Record, folio 8.

The plaintiff put in evidence a patent (founded on a preemption certificate) from the United States to him, dated 8th October, 1849, of lot 4, of sect. 6, township 28, north of range 22 west, containing 51 64-100 acres, according to the Government survey.

Printed Record, folio 15.

It was admitted in open court that the description in the patent embraced the lots described in the declaration, and that the defendant was in the possession of these lots.

Printed Record, folio 16.

The plaintiff rested his case upon the above evidence.

The defendant then offered in evidence a deed of conveyance from plaintiff to defendant, dated 8th May, 1849, of the premises described in the aforesaid patent. To this evidence the plaintiff's counsel objected, because the deed having been executed before the patent was issued, did not convey the estate which the plaintiff acquired by the patent, and hence was irrelevant and immaterial.

The Court overruled this objection and admitted this deed, and plaintiff's counsel excepted.

Printed Record, folios 17—19.

The defendant having further put in evidence, under objection from the plaintiff's counsel, the certificate of the Register of the contents of the Records of his office, rested his case.

Printed Record, folio 20.

The plaintiff's counsel then called as a witness the plaintiff himself, who detailed in full the circumstances under which he was induced by his elder brother, the defendant, to execute the deed of May 8th, 1849.

It appeared that when he executed the deed he was under 21 years of age, and that he was really *forced* by his brother the defendant, who was some 16 years his senior, to deed this property to the defendant.

It appeared that the plaintiff pre-empted the land; that he paid for it on the 21st day of February, 1849, and took an informal receipt for it of that date, which was subsequently replaced by a formal duplicate, but of what date does not appear. *Printed Record, folios* 21—24.

Mrs. McCormick, an elder sister of the plaintiff, testified as to the plaintiff's age, showing that he was a minor when he executed the deed of the 8th May, 1849.

Printed Record, folios 24—25.

The plaintiff then offered to prove by another sister of the plaintiff his age, and that he was under age the 8th of May, 1849, and thereupon the defendant's counsel announced that he should not controvert that fact.

Printed Record, folio 25.

And the plaintiff then rested, and the defendant's counsel then put in evidence under objection and exceptions by the plaintiff's counsel:

A written Lease, dated 8th day of May, 1854, from the defendant, John R. Irvine, to himself, the plaintiff, and two other persons doing business under the firm name of J. R. Irvine & Co., of *a certain warehouse*, situated on a parcel of the land described in the patent, and in the deed of the 8th May, 1849, but *not on any part of the premises described in the declaration.*

Printed Record, folios 27—28.

The defendant's counsel offered also to prove, and under objection and exception by the plaintiff's counsel was allowed to introduce the testimony of Mr. Humphrey: that said witness, some time in 1853 or 1854, took to the plaintiff a draft of a quit-claim deed from said plaintiff to one Tullis of two lots—parcels of the land described in said patent—but *no part of the premises described in said declaration*—and asked the plaintiff to execute it, and that the plaintiff refused to execute it, saying that he claimed no interest in those lots and it was unnecessary for him to execute the quit-claim.

Printed Record, folio 29.

And the defendant's counsel offered to prove by the testi-

mony of the defendant, that after the deed from plaintiff to defendant of 8th May, 1849, and before the commencement of this suit, large and valuable improvements, to the amount of $40,000, had been erected on portions of the land described in said deed, but *no part of them on the premises described in the declaration in this case;* and under the objection and exception of the plaintiff's counsel, defendant's counsel was allowed to introduce said testimony.

Printed Record, folio 26.

And the defendant's counsel then rested.

And the plaintiff's counsel then gave in evidence by competent witnesses: that some time in 1853 or 1854 the defendant applied to plaintiff to get plaintiff to execute to defendant a deed of the premises described in said deed of 8th May, 1849, and that plaintiff refused to execute the same, saying that if he had any rights to said property he intended to hold on to them; and also that in 1858 he gave notice in the newspapers of St. Paul that he claimed to be the owner of the premises described in said patent, and that the deed of 8th May, 1849, was void.

Printed Record, folio 30.

And defendant then rested.

The Court then gave certain instructions to the jury which were excepted to by the plaintiff's counsel, and refused to give certain instructions asked by defendant's counsel, which refusals were also excepted to by plaintiff's counsel.

Printed record, folios 30 *and* 35.

The jury returned a verdict for the defendant.

POINTS AND AUTHORITIES,

I.

The Court erred in admitting the deed from plaintiff to defendant of 8th May, 1849.

It could not convey the estate and title subsequently acquired by the plaintiff under the patent.

If it be regarded as an attempt to convey or assign the right secured to the plaintiff by his pre-emption of this land, it was *void* under the act of Congress of September 4th, 1841, by virtue of which the pre-emption was made.

5 *Stat. at Large, p.* 455, *Sec's* 10 *et seq. Ibid Sec.* 12.

Taylor vs Baker, 1 *Branch*, 245.

Arbour vs. Nettles, 12 *La. An.*, 217.

Penn vs. Ott, *Ibid* 233.

McCue vs. Smith et al., 9 *Minn.*, 255.

Cundiff vs. Orms, 9 *Port.* 58.

Marks vs. Dickson, 20 *How.*, 501.

See also, *Act of Congress of* 29*th May*, 1830, 4 *Stat. at Large*, 420; *Act of Congress of* 23*d Jan.*, 1832, 4 *Stat. at Large*, 496.

If the deed of 8th May, 1849, was void as coming within the prohibition of section 12 of the act of 1841, the covenants therein contained would of course be entirely inoperative for any purpose.

A deed *void* in its granting part cannot certainly be *operative* as a *conveyance* by virtue of its covenants.

2 *Hilliard on Real Property*, 419.

The deed of 8th May, 1849, from plaintiff to defendant, was then irrelevant and immaterial upon the issue before the Court, and should have been excluded.

II.

It having been proved and finally conceded by the defendant's counsel that the plaintiff was under age when he executed the deed of 8th May, 1849, to the defendant, the Court erred in allowing the defendant to show that large and valuable improvements to the amount of $40,000 had been erected on portions of the land described in said deed, but no part of them on the premises described in the declaration, and erred also in allowing the defendant to put in evidence the lease, from defendant to a firm of which both plaintiff and defendant were members, of a warehouse located on a part of the premises described in the said deed, but not on any part of the premises described in the declaration; and also erred in allowing the testimony of Humphrey that the plaintiff, in 1853 or 1854, refused to execute a quit-claim deed to one Tullis of two lots located on the premises described in said deed, but being no part of the premises described in the declaration, saying that he claimed no interest in those lots.

Printed Record, folios 26—29.

The only conceivable view in which this evidence could be offered is that it tends to prove the *confirmation* of the deed of the 8th May, 1849, by the plaintiff after he became of age.

But it is no evidence of such confirmation, because—

First—It does not affect the property described in the declaration;

Second—In the case of sale or deed of real estate by an

Infant, the act of *affirmance* by him after he becomes of age must be *as solemn in character as the original act itself.* Mere *acquiescence*, however long, if short of the statute of limitations, is not sufficient. The act of confirmation must be of such *solemn* and *unequivocal* nature, as to establish a *clear intention* to confirm the deed *after a full knowledge that it was voidable.*

Without some *clear*, *intentional*, *positive*, and *solemn* act of ratification by the plaintiff of this deed after he became of age he was at liberty to disaffirm or avoid it at any time within the statutory period of twenty years.

The evidence then offered and admitted was wholly incompetent and irrelevant for the purpose of showing the ratification or confirmation of the deed of 8th of May, 1849, by the plaintiff after he became of age.

It should have been excluded.

Tucker vs. Moreland, 10 *Pet.*, 65, 75–6.
Jackson vs. Carpenter, 11 *Johnson*, 542–3.
Jackson vs. Burchin, 14 *Johnson*, 124.
Curtin vs. Patton, 11 *Serg. & Raw.*, 309.
Lessee of Drake vs. Ramsey, 5 *Ohio*, 251–5.
Cressinger vs. Lessee of Welsh, 15 *Ohio*, 156, 193.
Boody vs. McKenney, 23 *Maine*, 517, 523–4.
N. H. M. F. Ins. Co. vs. Noyes, 32 *N. H.*, 345.
Voorhies vs. Voorhies, 24 *Barb.*, 150.
Rogers vs. Hurd, 4 *Day*, 57.
Zouch vs. Parsons, 3 *Burr.*, 1794.
Hoyle vs. Stowe, 2 *Dev. & Batt, N. C.*, 320.
2 *Greenleaf's Ev.*, § 362–8, *and authorities there cited.*
Chitty on Contracts, pp. 145–7, *and authorities cited in note.*
Story's Eq. Juris., Secs. 222–3, 240–2.

III.

The Court erred in refusing to instruct the jury: That the deed from plaintiff to defendant of 8th May, 1849, did not pass the estate acquired *subsequently* under the patent, even assuming the plaintiff to have been of full age at the time.

Printed record, folio 30. See authorities cited above under the first head as to the effect of the prohibition in the 12th section of the act of 1841.

See also authorities cited at *page* 624 *in vol.* 2 *of Smith's Leading Cases*, holding that an estate acquired after the execution of a deed, will not pass by its operation; also, that the conveyance will not conclude the grantor and those claiming under him from recovering the land at a subsequent period in direct contravention of his own grant.

IV.

The Court erred in refusing to give the second instruction asked by the plaintiff's counsel.

Printed record, folio 30.

The deed of 8th May, 1849, being executed by a minor and consequently the covenants in it being inoperative, and being also executed before the patent was issued to him, and therefore in violation of the prohibition contained in the 12th section of the Act of Congress of 4th September, 1841, was absolutely void, and the Court should have so instructed the jury.

V.

The Court erred in refusing to give the 6th, 7th & 12th instructions asked by the plaintiff.

Printed record, folio 31 *and folio* 33.

See authorities cited above under the second head.

For the same reason the Court erred in the instruction given. *Folio* 34, *printed record.*

VI.

For the same reasons the instructions asked by the plaintiff numbered 8 and 10, were material under the evidence which the defendant was allowed to put in, and should have been given.

Printed record, folio 32.

These instructions were correct not only by reason of the plaintiff's minority, but also because any agreement between the plaintiff and defendant relative to the pre-emption of this land of the character which the evidence tended to prove, would have been in direct contravention of the act of Congress and void. There could have been no agreement of the character indicated recognizable either in a court of law or equity, and hence none which could have been subsequently ratified or confirmed by the parties.

VII.

The Court in refusing to give the 10th instruction asked by the plaintiff, above considered, instructed the jury "that there had been evidence on the part of defendant going to

show that the plaintiff was employed to enter the land in question, and although an infant, as he afterwards affirmed his acts, would be bound by it."

Printed record, folio 33.

This instruction could hardly fail of misleading the jury. What act or acts of the plaintiff does the Court refer to, whereby the plaintiff affirmed his acts as the agent or employee of the defendant, or whereby he recognized such employment?

The deed of the 8th of May, 1849, could not be such an act of recognition or affirmance, because it is conceded that when that deed was executed the plaintiff was a minor.

And moreover, the taking of the patent of the land from the government by him after he came of age, would be in itself a clear *disaffirmance* of any agency, trust or employment exercised by him during his minority in the premises, and a clear *disaffirmance* of any and every act which he may have performed during his minority inconsistent with his right and intention to take the patent of the land from the government.

The receiving of the patent by the plaintiff necessarily closes all inquiries respecting his prior agency or employment in entering the land, even if such a question be open to judicial investigation at all.

By taking the patent, he in the most formal, solemn, effective and final manner possible, *disaffirms* and *repudiates* the agency or employment (if any there was) which he exercised on behalf of his brother in *entering the land;* and what he may have done *afterwards* is clearly immaterial on the question of his employment or agency in entering the land, though it might be material on the question of his affirmance or non-affirmance of the deed of 8th May, 1849.

The charge of the Court in effect assumes that there was

evidence of acts done by the plaintiff *after he came of age*, which affirmed or recognized his *employment by the defendant in entering the land;* whereas there was no evidence whatever tending to show such affirmance or recognition, and the Court must necessarily have misled the jury in assuming and thus practically instructing the jury, that the *effect* of the evidence put in, tended to establish such affirmance.

There was absolutely no evidence of any act on the part of the plaintiff after his majority, either prior to or after the issuance of the patent, tending to prove any affirmance of his employment by defendant in entering the land; and moreover, such an employment, had it existed, would have come directly within the purview of the act of 4th September, 1841, and would have constituted the very mischief which section 12 of that act was enacted to prevent. The employment would therefore have been void, and hence could not afterwards have been affirmed.

There are then but two questions presented by the case at bar:

First—Was the deed of 8th May, 1849, *void*, by reason of its contravening the act of Congress of Sept. 4th, 1841;

Or, *ineffectual to pass the subsequently acquired title and estate* of the plaintiff under the patent of 8th October, 1849?

Second—If the deed was merely *voidable*, by reason of the infancy of the grantor, did he, after he came of age, *affirm* the deed?

If the deed was *void*, or if it did not pass the estate subsequently acquired by virtue of the patent, no act of the plaintiff afterwards done could have the effect of confirming or making effectual this deed.

If the deed was merely *voidable* by reason of the infancy of the grantor, the act of affirmance by him after he became

of age, must have been as solemn in character as the original act itself, or at all events of such solemn and unequivocal nature as to establish a clear intention to confirm the deed, after a full knowledge that it was voidable. There is no evidence whatever of any such act.

LORENZO ALLIS,
Of Counsel for Plaintiff in Error.